Filed 8/2/02 Dept. Of Child Support v. Lambert CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DEPARTMENT OF CHILD SUPPORT, Plaintiff and Respondent, v. RODNEY S. LAMBERT, Defendant and Appellant.	E030586 (Super.Ct.No. RID 340990DA1) OPINION

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part; reversed in part.

M.J. De La Pena for Defendant and Appellant.

John Replogle, Director, and Hirbod Rashidi, Deputy Child Support Attorney, for Plaintiff and Respondent.

1. Introduction

The County of Riverside (County) filed two separate complaints to collect child support payments from the father, Rodney S. Lambert. After County had obtained a default judgment on one of the complaints, Lambert filed a motion to set aside the judgment. The court denied the motion and Lambert now appeals. Lambert claims the court erred in both

denying this motion to set aside the judgment, which involved past and future child support payment obligations, and denying his motion for attorney fees and sanctions.

We conclude that the trial court abused its discretion in finding that Lambert had failed to demonstrate sufficient grounds for setting aside the judgment. We, however, reject Lambert's claim concerning his motion for attorney fees and sanctions. We reverse in part and affirm in part.

2. Factual and Procedural History

On June 9, 1998, the Riverside County District Attorney, on behalf of County, filed a complaint (case number 340990DA1) against Lambert to collect child support for Andrew H. (born in July 1995) in the amount of $370 per month. The complaint alleges that the child's parent or caretaker first received public assistance on July 6, 1995. On October 9, 2000, Lambert was served with this complaint. The delay was caused, at least in part, by the district attorney's unsuccessful efforts to establish another potential father's paternity.

On September 20, 2000, the district attorney filed a second complaint (case number 437626DA) against Lambert to collect support for the same child in the amount of $390 per month, which was later increased to $678 per month. The complaint alleges that the child's parent or caretaker first received public assistance on August 1, 2000. Lambert was served with this complaint on October 9, 2000.

After receiving notice of the child support matter, Lambert voluntarily submitted to genetic testing, the results of which established that he was indeed the child's father.

Lambert answered the complaint in case number 437626DA. In his answer, Lambert contested the amount of the support and the date the support obligation began to accrue.

Based on Lambert's failure to answer the complaint in case number 340990DA1, the district attorney filed a request for default judgment. In the resulting judgment, the court ordered Lambert to pay child support in the amount of $370 beginning on the date that the child's parent or guardian first received public assistance. After obtaining judgment in case number 340990DA1, the district attorney filed, and the court granted, a request for dismissal in case number 437626DA.

In response, Lambert filed his motion to set aside the child support order. Lambert also filed a request for attorney fees and a separate request for sanctions.

The court denied Lambert's motion to set aside the judgment and his request for sanctions.

3. Motion to Set Aside

Lambert claims the trial court erred in finding that he had failed to provide good cause for granting his motion to set aside the default judgment.

Under Code of Civil Procedure section 473, subdivision (b), a trial court may "relieve a party . . . from a judgment, dismissal, or order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

In reviewing the trial court's decision under this provision, we apply the deferential abuse of discretion standard.[1] "The discretion conferred upon the trial court, however, is

[1] *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1180.

not a ‘“‘capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.’” [Citations.]’ [Citation.]”[2]

In addition, we are mindful of the policy in favor of allowing a party to have a hearing on the merits of his case.[3] “Therefore, any doubts in applying section 473 must be resolved in favor of the party seeking relief. When the moving party promptly seeks relief and there is no prejudice to the opposing party, very slight evidence is required to justify relief. We will more carefully scrutinize an order denying relief than one which permits a trial on the merits.’ [Citation.]”[4]

Section 473 requires that the moving party demonstrates the existence of mistake, inadvertence, surprise, or excusable neglect. The relevant inquiry is whether a reasonably prudent person under the same or similar situation might have acted in the same way.[5]

---

[2] *Stafford v. Mach, supra*, 64 Cal.App.4th at page 1180.

[3] *Stafford v. Mach, supra*, 64 Cal.App.4th at page 1181; *Rogalski v. Nabers Cadillac* (1992) 11 Cal.App.4th 816, 819.

[4] *Rogalski v. Nabers, supra*, 11 Cal.App.4th at pages 819-820.

[5] *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 671; see also *Department of Water & Power v. Superior Court* (2000) 82 Cal.App.4th 1288, 1293.

In this case, the record indicates that Lambert did not act unreasonably in failing to answer the complaint in case number 340990DA1. Some confusion on Lambert's part is justified by the mere fact that the district attorney filed two separate actions against him based on two separate applications for public assistance. Although the cases had different case numbers, both had to do with the payment of child support involving the same child.

Furthermore, while Lambert filed his answer to case number 437626DA approximately two months after the court entered the default judgment in the other case, Lambert acted reasonably in mistakenly assuming that he was doing all that was necessary in responding to the action or actions against him. Within days of being served, Lambert signed a stipulation for genetic testing. Notably, the stipulation listed only case number 437626DA. In January of 2001, the genetic test results revealed that Lambert was the child's biological father. The lab report also listed case number 437626DA. In the following month, February of 2001, Lambert, who was accompanied by the child's mother, met with the district attorney to decide on the appropriate course of action, and in particular, the amount of child support and the schedule for payment. Under these facts, it was "patently obvious" that Lambert was making efforts to resolve the child support matter.[6]

Despite these ongoing efforts, about a month later in March of 2001, the district attorney filed a request for default judgment in case number 340990DA1. The record does

---

[6] *Neal v. Superior Court* (2001) 90 Cal.App.4th 22, 26; see also *County of San Diego v. Magri* (1984) 156 Cal.App.3d 641, 647.

not disclose the district attorney's motivation in seeking the default judgment. Nevertheless, the effect of such action deprived Lambert of an opportunity to litigate the issues of the amount of child support and the date the support obligation began to accrue. "In such cases, the law 'looks with [particular] disfavor on a party who, regardless of the merits of his cause, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary.' [Citation.]"[7] Upon discovering the two cases addressing the same subject matter, the district attorney should have filed a request to dismiss one of the cases, rather than a request for default judgment on the one case that, for the most part, remained inactive.

County also contends that Lambert failed to comply with the procedures for filing a motion to set aside the judgment. Section 473, subdivision (b) requires that the party's request be accompanied by a copy of the answer or other proposed pleading. County's contention lacks merit. Despite any technical noncompliance, by that time, Lambert had already submitted an answer to the complaint in case number 437626DA. Under the unusual facts in this case, the requirement of a proposed answer was superfluous when the court already had Lambert's actual answer to a substantially similar complaint.[8]

We conclude that the trial court abused its discretion in granting county's request for default judgment.

---

[7] *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.

[8] See *Job v. Farrington* (1989) 209 Cal.App.3d 338, 340-341.

4. Arrearages

The critical difference between the two complaints is the date that the child's parent or guardian first received public assistance. This date is significant because it establishes the limit for retroactive application of the child support order. While the complaint in case number 340990DA1 notes this date as July 6, 1995, the complaint in case number 437626DA notes the date September 29, 2000, a difference of over five years. Without considering father's current child support obligation, father owes over $17,000 in arrears based on case number 340990DA1, but only about $3,500 in arrears based on case number 437626DA. The overdue amounts reflect both the principal amount due plus the interest accrued during the period of nonpayment.

Father claims the trial court erred in making the child support order retroactive to July of 1995. Father claims that, until August of 2000, he was unaware that he was the child's father. Nevertheless, based on the default judgment in case number 340990DA1, he is responsible for child support and interest for a period of about five years despite being unaware of the child's existence and his financial obligation.

In citing *County of Santa Clara v. Perry*,[9] father argues that County could not seek reimbursement for child support before the date of filing a notice of the order to show cause. Father notes that the district attorney never filed an order to show cause to establish paternity in case number 340990DA1.

---

[9] *County of Santa Clara v. Perry* (1998) 18 Cal.4th 435.

In *County of Santa Clara v. Perry*, the California Supreme Court decided whether child support may be retroactive to the date of filing of the complaint or the date of filing of the motion or order to show cause. The court reasoned: ". . . [U]ntil there is at least a prima facie showing of paternity, the defendant in a paternity action remains a legal stranger to the child. Indeed, the Legislature may be as eager to encourage prompt establishment of paternity as it is to ensure adequate child support."[10] Therefore, the court held that, ". . . the retroactivity of the support order is determined by the date of filing of the notice of motion or order to show cause."[11]

In a case from this court, *County of Riverside v. Burt*,[12] we decided that, under former Welfare and Institutions Code section 11350, retroactive application of a child support order was not limited to the date of filing of the notice of motion or order to show cause. Before continuing in our discussion of our decision in *County of Riverside v. Burt*, we note that, in his reply brief, Lambert contends that the statute does not apply to him because it limits its application to "any case of separation or desertion of a parent."[13] Although father was not separated from the mother nor deserted his child, he nevertheless was separated or apart from the child and that separation resulted in the County's provision

---

[10] *County of Santa Clara v. Perry, supra*, 18 Cal.4th at page 446.

[11] *County of Santa Clara v. Perry, supra*, 18 Cal.4th at page 445.

[12] *County of Riverside v. Burt* (2000) 78 Cal.App.4th 28.

[13] Welfare and Institutions Code section 11350, subdivision (a).

of public assistance. As applied in *County of Riverside v. Burt*, the statute does not require a prior relationship between the noncustodial parent and the child.[14]

In *County of Riverside v. Burt*, we stated that, former Welfare and Institutions Code section 11350 authorized the collection of arrearages for the entire period of the noncustodial parent's separation from the family.[15] In reading the statute together with Code of Civil Procedure section 338, we stated that a three-year statute of limitations applied.[16] Therefore, a noncustodial parent was liable for support from the date that the custodial parent or guardian first received aid, subject only to a three-year statute of limitations.[17]

Former Welfare and Institutions Code section 11350 was repealed and reenacted as Family Code section 17402.[18] Family Code section 17402 provides that, in cases filed on or after January 1, 2000, retroactive application of child support orders is limited to one year before the filing of the complaint.

In this case, although the district attorney filed case number 340990DA1 in June of 1998, the district attorney filed case number 437626DA in September of 2000. Lambert

---

[14] See *County of Riverside v. Burt, supra*, 78 Cal.App.4th at page 30.

[15] *County of Riverside v. Burt, supra*, 78 Cal.App.4th at page 34.

[16] *County of Riverside v. Burt, supra*, 78 Cal.App.4th at page 34.

[17] *County of Riverside v. Burt, supra*, 78 Cal.App.4th at page 38; *City and County of San Francisco v. Funches* (1999) 75 Cal.App.4th 243, 245.

received notice of both complaints on the same date, October 9, 2000. Having received notice in October of 2000, well after the effective date of the new Family Code provision, it may be unfair--unless the delay in service was Lambert's own fault--to subject him to the former law. Nevertheless, retroactive application of the child support order depends entirely on the complaint under which the trial court decides to proceed on remand. Based on our resolution of the first issue, it is premature at this time to determine whether the trial court erred in applying Welfare and Institutions Code section 11350 and making the child support order retroactive to July of 1995.

5. Attorney Fees and Sanctions

Lambert claims the trial court erred in denying his motion for attorney fees and sanctions.

Family Code section 273 provides: "Notwithstanding any other provision of this code, the court shall not award attorney's fees against any governmental agency involved in a family law matter or child support proceeding except when sanctions are appropriate pursuant to Section 128.5 of the Code of Civil Procedure or Section 271 of this code."[19] Section 128.5 of the Code of Civil Procedure allows a trial court to award to one party the expenses incurred by the other party's "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." Section 271 of the Family Code also allows a trial court to award sanctions against the party that frustrates settlement efforts, thereby

---

[footnote continued from previous page]

[18] Statutes 1999, chapter 478, sections 1, 8.

[footnote continued on next page]

increasing the costs of litigation.[20] We apply the deferential abuse of discretion standard in reviewing a trial court's decision denying a request for attorney fees and sanctions.[21]

We discern no abuse of discretion in this case. Nothing in the record affirmatively indicates that County acted in bad faith when it filed its request for default judgment. County may have filed the request as a matter of course, inadvertently neglecting to realize Lambert's willingness to settle the matter. Although the default judgment deprived Lambert of an opportunity to litigate the contested issues regarding the amount of child support and the retroactive application of the order, the court did not find the County's conduct to be so egregious as to warrant sanctions.

In any event, an award of sanctions is purely discretionary.[22] Lambert fails to demonstrate that the court's decision constituted a manifest miscarriage of justice.[23]

6. Disposition

We reverse the default judgment in case number 340990DA1 and the corresponding judgment of dismissal in case number 437626DA. We direct the trial court to dismiss one

---

[footnote continued from previous page]

[19] See also Family Code section 3557, subdivision (b).

[20] See also *In re Marriage of Mason* (1996) 46 Cal.App.4th 1025, 1028.

[21] See *In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 82.

[22] *In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 178; *Muega v. Menocal* (1996) 50 Cal.App.4th 868, 873; *Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299, 304.

[23] *Muega v. Menocal, supra,* 50 Cal.App.4th at page 874.

of these cases to avoid any further confusion. We affirm, however, the court's denial of attorney fees and sanctions at trial. Lambert shall recover his costs on appeal. We deny his request for sanctions on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/McKinster
Acting P. J.

s/Ward
J.